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January 30, 1985

A. Dean Pickett, Esq.
Mangum, Wall, Stoops & Warden
222 East Birch Avenue
P. O. Box 10
Flagstaff, Arizona 86002

Re: I85-014 (R84-221)

Dear Mr. Pickett:

Pursuant to A.R.S. § 15-253.B, we concur with the opinions expressed in your letter to Bill R. Williams, Superintendent of Flagstaff Unified School District No. 1, in which you conclude that educational placement decisions relating to handicapped children must initially be made by the local school district in which the child resides. We also concur with your conclusion that a preliminary placement decision must be reviewed by the school district individualized education program (IEP) team if the child's parents request a review.

In addition, we concur with your conclusion that, in the case of a child who is developmentally disabled as defined by A.R.S. § 36-551.10, the Arizona Department of Economic

Security and the local district must coordinate ~~in~~ the development of a handicapped student's individualized education program if residential placement is recommended by the school district. We revise your opinion to add that the district must ensure that a representative of the private school facility or facilities being considered attend or participate in the IEP process. 34 C.F.R. § 300-347.a.

Finally, we concur with your conclusion that the school district must comply with bidding procedures established by the state board of education pursuant to A.R.S. § 15-213.A if the cost of placement is anticipated to meet the threshold amount set by statute for the competitive bidding requirement. See Ariz.Atty.Gen.Op. I84-152 for a discussion of the conflict between pertinent statutory provisions in setting the threshold amount.

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

BC/TLM/lsp

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December 20, 1984

R84- 221

Mr. Bill R. Williams
Superintendent
Flagstaff Unified School District No. 1
701 N. Kendrick
Flagstaff, Arizona 86001

Re: Placement of Handicapped Students

Dear Mr. Williams:

You have requested this firm's opinion in answer to the following questions:

Question 1: Under Arizona law and the Federal Education of All Handicapped Children Act (EAHCA), is the preliminary decision as to whether private school placement of a handicapped child receiving special education is necessary in order to provide such special education to be made by the school district where the child resides?

Question 2: If the answer to the first question is affirmative, how is the selection of the specific private school program carried out?

Question 3: Does this result differ if the private school placement is in a residential setting?

As will be set forth in the body of this opinion, it is our opinion that the answer to the first question is affirmative, subject to the right of review under pertinent due process standards to be discussed below. The answer to the second question is that selection of the specific private school placement is, subject to appropriate bidding laws, a decision of the school district. In answer to the third question, when the placement involves a private residential placement, the selection of the specific placement is to be a mutual determination of the school district

and the state agency providing non-educational services to the student, if any.

Public schools in Arizona are charged with the obligation, both under State and Federal law, to provide special education programs to handicapped children within their districts. A.R.S. §§15-763, 15-764; 20 U.S.C. §1401, et seq. The focal point in determination of the special education placement of a handicapped child is the individualized education program (IEP). 20 U.S.C. §1412; 34 C.F.R. §300.340, et seq. Both under State and Federal law, the responsibility in the first instance for design of the individualized education program lies with the local public school district (known under Federal law as the "local educational agency"). 20 U.S.C. §1401; 34 C.F.R. §300.341; Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982). Of course, parental input, as well as other factors are part of the decision-making process.

While the general principle underlying these laws is that handicapped children be "mainstreamed" to the extent possible, (that is, educated together with non-handicapped children) the law specifically contemplates that this will not be appropriate in all instances; the majority of court opinions in this area deal with private residential placements.

> Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The [EAHCA] expressly acknowledges that "the nature of severity of the handicap [may be] such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily." §1412(5). The [EAHCA] thus provides for the education of some handicapped children in separate classes or institutional settings. See, Ibid; §1413(a)(4). Rowley, supra, at 181.

Numberous court decisions have recognized that:

> Under the appropriate circumstances, local school districts must provide residential placement to the handicapped child [citations omitted]. As stated of the court in Gladys J. v. Pearland Indep. School Dist. [520 F.Supp. 869, S.D.Tex., 1981]
>
> > Federal regulations explicitly contemplate residential placement if such a program is necessary to provide special education and related services to a handicapped child . . .. In short, little doubt remains that residential placement is part of "specially designed instruction . . . to meet the unique needs of the handicapped child" required by the EAHCA.
>
> The regulations promulgated to enforce the Act contemplate also that residential placement may be necessary in order to provide an appropriate education. . . . Obviously, when the circumstances of an individual case require that the handicapped child be provided a residential program, the Acts' directives regarding mainstreaming . . . becomes [sic] secondary and should not preclude such a placement. See, Gladys J. v. Pearland Indep. School Dist., . . . "mainstreaming is clearly a predominant thesis underlying the [Act]. Courts, however, have been quick to recognize that the overriding requirement of a free appropriate public education may preclude mainstreaming in certain areas". Stacey G., etc. v. Pasadena Independent School District, 547 F.Supp. 61, 79 (1982).

Under Arizona law, the decision to make a private school placement, residential or otherwise, to provide special education for a handicapped child, like other basic decisions in the provision of the required "free appropriate

public education", rests again in the first instance with the local school district. A.R.S. §§15-764 and 15-765. This becomes especially important when the students receiving special education services are also receiving services from the Arizona Department of Economic Security (D.E.S.) provided for developmentally disabled and mentally retarded persons pursuant to Title 36, Arizona Revised Statutes. The interplay between D.E.S. and the local school district is described and clarified in a reading of both Title 36 and Title 15.

Initially, it is noted that the Arizona Legislature has provided that both parties to these dealings shall coordinate with the other in general terms with regard to the design of the school district's IEP and the Department of Economic Security's "individual program plan." A.R.S. §36-555.B provides in pertinent part that: "The Department shall coordinate its development of an individual program plan for a developmentally disabled person . . . with the school district in which the developmentally disabled person is enrolled with the school district's development of an individual education program plan for such a person." That Section further provides in Subsection F that:

> The Department shall coordinate the residential placement of all school-age developmentally disabled persons in residential housing facilities operated or supported by the Department with the school districts in which such residential facilities will be located and with the Department of Education in a manner which will make best use of existing programs and facilities and operational capabilities and which will not cause serious overcrowding of school facilities or programs. [Emphasis added]

The decision to provide for private school placement within the framework of a particular student's IEP, however, rests clearly with the local school district, not with the Department of Economic Security. This conclusion is apparent from a further review of the separate missions

assigned to each of these agencies in their roles of providing services for handicapped children. A.R.S. §36-551.01.D. provides:

> Every school-age developmentally disabled person shall have the right to receive publicly-supported educational services in accordance with the applicable specific education laws of the State. [emphasis added].

The "applicable specific education laws of the State", in this instance, clearly give to the school district the responsibility in the first instance to determine whether private placement is required, and where it is to be in a residential setting, the laws include A.R.S. §15-765.D:

> The school district shall notify the appropriate state agency that placement of a child in a private residential program is necessary to provide special education.

The appropriate state agency, in this case, providing the residential element is of course the Arizona Department of Economic Security. The sentence quoted immediately above makes it clear that the basic determination in the IEP to generally provide education "in a private residental program" is vested with the local school district which then notifies D.E.S. of the need for such placement. The D.E.S. does not in such instance participate in the threshhold decision to determine whether, in general, residential placement is required in a particular child's IEP.

This position is bolstered as well by further provisions of Title 36. Specifically, A.R.S. §36-552.B provides:

> No provisions of this Chapter shall be construed to give the Department [of Economic Security] control of lawful activities of other governmental agencies . . . unless by specific contract or agreement therefor.

Further, A.R.S. §36-554.A provides that:

> The director shall: . . .
>
> 3. Coordinate the planning and implementation of developmental disability programs and activities, institutional and community, of all state agencies, provided this shall not be construed as depriving other state agencies of jurisdiction over, or the right to plan for and control, and operate programs that pertain to developmental disability programs, but which fall in the primary jurisdiction of such other state agencies. [Emphasis added]

Once the threshold decision, within a particular student's IEP, is made to provide for residential placement in a private residential program, the selection of the specific residential placement to be obtained then becomes a mutual decision between the local school district and the Arizona Department of Economic Security, subject to certain constraints. A.R.S. §15-765.D goes on to provide that the program to be selected "shall be one which has been approved by the Department of Education for special education and licensed by the Department of Economic Security for twenty-four hour care. Residential placement shall be made by mutual agreement between the school district and the appropriate state agency." [Emphasis added]

To summarize, there are essentially two decisions required in each instance when residential placement is considered in a particular student's IEP. The first decision is whether placement of the child in a private school program is necessary. This threshhold decision is vested in the local school district. Where the decision is for residential placement, A.R.S. §15-765.D. confirms again that the school district makes this decision.

The second decision, once the need for private school placement is determined by the local school district, relates to the selection of the specific private program.

Where no residential school placement is contemplated, the school district again makes this determination. Where residential placement is called for, the exact residential placement is then selected and made "upon mutual agreement between the school district" and the Department of Economic Security.

The primary role of the local school district in selecting private placement also is supported by a reading of the provisions of Title 36 cited above, specifically §36-555.F, requiring the Department of Economic Security to place its clients in a manner which makes best use of "existing programs and facilities and operational capabilities of schools," thus not requiring a district to expand its "existing" special education programs where the preparation of an I.E.P. demonstrates that a private school placement of a child will provide the most appropriate education, and §36-554.A.3, which causes the Department of Economic Security to defer to the Department of Education and thence local school districts, which have "primary jurisdiction" over special education, in the implementation of the developmental disability programs under D.E.S. jurisdiction.

Of course, the determination to make residential placement remains in each instance subject to the rights of the parents, guardian or surrogate parent to initiate appropriate due process procedures under state and federal law for a review of the placement. Further, under present Arizona law, the selection of a private school, residential or otherwise, would have to be based upon a competitive selection procedure if it is anticipated that the cost of services in each case would exceed $5,000.00 per year. A.R.S. §15-213. See Op.Atty.Gen. I84-152 ($10,000.00 bid limit of Ch.80, 1984 Ariz. Sess. Laws (2nd Reg.Sess.) in conflict with Ch. 251, §6, 1984 Ariz. Sess. Laws (2nd Reg. Sess.); $5,000.00 bid limit presumptively still effective until further legislative action.)

These propositions are confirmed by, among other authorities, the recent decision of the Ninth U. S. Circuit Court of Appeals in Wilson v. Marana Unified School District No. 6 of Pima County, 735 F.2d 1178 (9th Cir., 1984). Under

the Court's opinion, great "deference to the sound judgment of the various state educational agencies" is required in determining the appropriateness of a special education setting for a handicapped child. 735 F.2d at 1183. See also, Pinkerton v. Moyer, 509 F.Supp. 107 (W.D.Va., 1981).

The special expertise provided within public school districts, subject to rights of due process review, dictates that they be responsible for the initial decision to place the handicapped child in a private school program. The policy of coordination of the Department of Economic Security's individual program plan with the local school district's individualized educational program requires cooperation, but does not in any manner divest the local school district of the requirements placed upon it by state and federal law to design and provide an appropriate educational program for each handicapped student, which may include private school placement when indicated, in a residential setting or otherwise. The responsibility of D.E.S. in the educational program for a handicapped child begins after the school district determines that private residential placement is required, at which point the selection of a specific residential placement is arrived at by mutual agreement between the school district and D.E.S.

We are forwarding this opinion to the Attorney General for his review pursuant to A.R.S. §15-253. Please contact us if we can be of any further assistance in this inquiry.

Yours very truly,

MANGUM, WALL, STOOPS & WARDEN

A. Dean Pickett

ADP:djg

cc: Robert K. Corbin, Esq.
John L. Verkamp, Esq.